

Commission therefore has no sound basis for requiring unbundling of dark fiber to enterprise customers.

If the Commission eliminates all broadband unbundling obligations for mass-market and enterprise customers alike — as it should — then there will be no need to distinguish between mass-market and enterprise customers for purposes of the Commission’s broadband unbundling rules going forward.

**2. *The Commission Should, at a Minimum, Adopt a Uniform National Rule Defining the Circumstances Under Which No Unbundling Obligation Applies***

The Commission has made it clear that next-generation fiber-to-the-premises networks that serve mass-market customers need not be unbundled.<sup>158</sup> The Commission has also made it clear that the mass market includes *some* business customers, although it has not specified precisely which ones.<sup>159</sup> A clear, uniform national rule defining the circumstances under which no unbundling obligation applies is needed so that carriers planning fiber deployments will know which customers benefit from the Commission’s so-called “fiber-to-the-home” rules.<sup>160</sup>

The rule must be clear so that companies can plan and build their networks without continuing uncertainty about when those networks are and are not potentially subject to

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<sup>158</sup> See *Triennial Review Order* ¶¶ 273-277; see also *USTA II*, 359 F.3d at 583-84 (upholding Commission’s decision not to require unbundling of FTTH loops).

<sup>159</sup> See *Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 19020, ¶¶ 37-38 (2003) (removing the word “residential” from the Commission’s rules regarding “fiber-to-the-home loops”); see also *Opposition of the FCC to Allegiance Telecom’s Motion for Stay Pending Review at 13, Allegiance Telecom, Inc. v. FCC*, Nos. 03-1316, *et al.* (D.C. Cir. filed Oct. 21, 2003) (“nothing in the Commission’s discussion of FTTH loops indicates that the FTTH non-impairment finding was limited to residential end users,” so the *Errata* “merely conformed the rule to the discussion in the text of the [*Triennial Review*] Order”).

<sup>160</sup> Because the Commission’s mass-market “fiber-to-the-home” rules apply to businesses as well as homes, it would be appropriate to replace that term and its abbreviation (“FTTH”) with “fiber-to-the-premises” and “FTTP,” respectively, throughout the Commission’s rules.

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unbundling. And the rule must be uniform nationally so that broadband networks are not subject to a patchwork of different unbundling obligations in different geographic areas. The significant inefficiencies and extra costs associated with any unbundling obligation are magnified if *different* obligations apply to different portions of the network because carriers cannot then take advantage of the economies of scale and other efficiencies associated with purchasing, operating, and maintaining a single set of facilities and systems.

Accordingly, the Commission should clarify first and foremost that next-generation fiber-to-the-premises networks are not subject to unbundling obligations, regardless of the customer served. Imposing unbundling obligations on these networks for *any* group of customers would put broadband providers to the choice of not serving particular customers or having to incur the enormous costs and operational difficulties of modifying their next-generation networks to support unbundling. Both of these choices are inconsistent with the Commission's goal of encouraging deployment of these next-generation broadband networks. Consequently, when broadband providers make a generalized roll-out of fiber-to-the-premises infrastructure to serve mass-market customers in a given area, the resulting network should be free of unbundling, regardless of what kind of residence or business is served by that network.

To the extent that the Commission retains any unbundling obligation for *enterprise* customers, the Commission should make it clear that the obligation applies only where customers are purchasing a separate, customized network solution, rather than obtaining service through a generalized roll-out of a next-generation fiber-to-the-premises network in a particular geographic area. Differentiating enterprise customers on the basis of their obtaining a customized broadband solution is consistent with Commission's own analysis of the difference between enterprise and mass-market customers: The Commission has stated that, "[i]n the enterprise market, companies

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are able to target individual buildings and customers and determine which technology is the optimal means of reaching each customer,” while, “in the mass market where revenues are small, customers are typically served in large groups, using uniform technologies and mass-marketing and provisioning techniques to minimize the cost of serving each customer.” *Triennial Review Order* ¶ 309. Clarifying that there is no unbundling obligation for a generalized fiber-to-the-premises deployment, regardless of the customer served, addresses the Commission’s concerns.

Moreover, to the extent that the Commission retains a distinction between the enterprise customers and mass-market customers for any network architectures (other than fiber-to-the-premises addressed above), the Commission should make it clear that *any* customers with 48 or fewer telephone numbers are part of the mass market. This bright-line test is easy both to apply and to verify. Telephone numbers make a more appropriate criterion for separating mass-market from enterprise customers than bandwidth or other measures of capacity because broadband networks bring increased capacity, and a rule based purely on capacity rather than telephone numbers would effectively penalize carriers for introducing new, high-bandwidth services. Other measures, such as the number of “lines” may not provide as good a proxy for customer size as the number of telephone numbers used, especially in the case of a business that uses a private branch exchange.

Furthermore, intermodal competition for customers of this size, especially competition from cable companies, is robust and increasing. The National Cable Telecommunications Association has recently testified before Congress that cable operators are now “in a position to serve smaller and medium-sized businesses. And as the cable modem technology itself is improved so that we can offer usage sensitive and tiered pricing arrangements, increasingly the

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small business market will be attractive to us.”<sup>161</sup> A study by In-Stat/MDR analyzed businesses with 5 to 99 employees and similarly found that, as of year-end 2003, 2.1 million small businesses were using cable broadband, while only 400,000 small businesses were using DSL.<sup>162</sup> Additional evidence of cable companies and other broadband providers targeting business customers is summarized in the *2004 Fact Report*.<sup>163</sup>

#### **B. The Commission May Not Lawfully Reintroduce Line Sharing**

Verizon has previously explained why the Commission’s decision not to require mandatory line sharing at UNE rates was correct both legally and factually.<sup>164</sup> Nevertheless, the Commission has incorporated into this docket the record on a pending petition to reconsider the decision in the *Triennial Review Order* to eliminate line sharing, and so it is appropriate to recapitulate briefly here why the Commission must deny that petition.

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<sup>161</sup> *The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something In Between?: Hearing Before the Subcomm. on Telecomms. and the Internet of the House Energy and Commerce Comm.*, 108th Cong., at 64 (July 21, 2003) (statement of Robert Sachs, President & CEO, NCTA), available at <http://energycommerce.house.gov/108/action/108-40.pdf>.

<sup>162</sup> K. Burney, In-Stat/MDR, *The Data Nation: Wireline Data Services Spending and Broadband Usage in the US Business Market; Part Three: Small Businesses (5 to 99 Employees)* (Dec. 2003); see also Yankee Group, *Cable and DSL Battle for Broadband Dominance* (Feb. 12, 2004) (finding that for small businesses with fewer than 10 employees “cable modem and DSL maintained an equal share” and that “cable operators have been extremely successful in serving businesses with 10 people or less”).

<sup>163</sup> See *2004 Fact Report* at III-38, Table 19; *id.*, App. A at A-3 to A-5 & Table 3, A-8, Table 6.

<sup>164</sup> See, e.g., Response of Verizon to Petitions for Reconsideration at 41-53, CC Docket Nos. 01-338, *et al.* (FCC filed Nov. 6, 2003); Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (July 22, 2004); Ex Parte Letter from Michael K. Kellogg, Kellogg, Huber Hansen, Todd & Evans, PLLC, to Michael K. Powell, Chairman, FCC, CC Docket Nos. 01-338, *et al.* (FCC filed Aug. 18, 2004).

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The Commission cannot reinstate line sharing lawfully, and those parties who suggest otherwise are asking the Commission to flout D.C. Circuit’s mandate in *USTA I* and *USTA II*. Furthermore, the imposition of mandatory line sharing would be contrary to the public interest. Recent market facts demonstrate that broadband competition is thriving without line sharing and that competition has *increased* significantly in the year since the Commission released the *Triennial Review Order*. Prices are declining, facilities deployment over cable, wireless, and wireline platforms — soon to be joined by power lines — is growing, and subscribership is rising by nearly 2 million customers every quarter. In short, consumers are getting all the benefits of real competition. Even EarthLink — a leading proponent of mandatory line sharing — has publicly acknowledged benefits that competition has brought to the broadband market. According to EarthLink, “[t]he intensity of competition in the telecommunications industry has resulted in significant declines in pricing for telecommunications services that we purchase, and such declines have had a favorable effect on our operating performance.”<sup>165</sup>

**1. The Imposition of Line Sharing Would Flout the D.C. Circuit’s Mandate**

In vacating the Commission’s line-sharing rules in *USTA I*, the D.C. Circuit established that a proper impairment analysis in this context must consider all broadband alternatives, including intermodal alternatives. The court vacated the Commission’s line-sharing requirement because this Commission improperly viewed the “service” that carriers seek to offer for purposes of the § 251(d)(2) impairment inquiry as limited to those provided over wireline facilities, *i.e.*, DSL services. *See* 290 F.3d at 429. The D.C. Circuit rejected that test as inconsistent with the Supreme Court’s admonition that the Commission “‘cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent’s network.’” *Id.* (quoting *Iowa Utils.*

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<sup>165</sup> EarthLink, Inc., Form 10-K at 10 (SEC filed Mar. 5, 2004) (“EarthLink Form 10-K”).

*Bd.*, 525 U.S. at 389). In the court’s view, the Commission’s failure to consider intermodal alternatives in its impairment analysis constituted a “naked disregard of the competitive context.” *Id.* This D.C. Circuit holding was reiterated in *USTA II*. See 359 F.3d at 585 (noting that the Commission’s reliance on the existence of “substantial intermodal competition” in the *Triennial Review Order* “follow[ed] our mandate in *USTA I*”). In affirming the Commission’s decision just last year *not* to mandate line sharing, the D.C. Circuit noted that “intermodal competition in broadband, particularly from cable companies, means that, even if CLECs proved unable to compete with ILECs in the broadband market, there would still be vigorous competition from other sources.” *Id.* at 580.

In view of these binding precedents — and the robust intermodal competition in the broadband market, which the Commission has repeatedly acknowledged<sup>166</sup> — it would be unlawful for the Commission to attempt to reimpose line sharing now. The Commission could not rationally conclude that intermodal competitors are “impaired” within the meaning of § 251(d)(2) without line sharing because so many intermodal and intramodal competitors are successful without it, as discussed below.

**2. *Eliminating Line Sharing Has Proven To Be Strongly Procompetitive, as the Commission Predicted***

Since February 2003, when the Commission issued its public notice announcing the elimination of line sharing, broadband competition has flourished, thus refuting the dire predictions of some parties that competition would suffer. Relying on the de-regulatory

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<sup>166</sup> For instance, the Commission stressed earlier this year that “[b]roadband Internet access services are rapidly being developed or provided over technologies *other* than wireline and cable, such as wireless and powerline.” Notice of Proposed Rulemaking and Declaratory Ruling, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676, ¶ 37 n.82 (2004) (emphasis added).

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promises made when the Commission announced its *Triennial Review Order*, Verizon has significantly increased the reach of its DSL services by investing more than \$600 million since the beginning of last year. *See* Declaration of Peter J. Castleton ¶ 10 (“Castleton Decl.”) (Attachment [REDACTED]). Verizon alone added 10 million DSL-qualified lines last year, and it intends to add another 7 million this year. *Id.* Since the Commission announced its decision, consumers have benefited from falling broadband prices, with DSL providers leading the way in reducing rates and increasing download speeds. *See id.* ¶¶ 3, 13. Cable operators have responded in kind with promotional and targeted price reductions and by increasing data speeds (which effectively lowers the price of bandwidth).<sup>167</sup> They have also expanded their broadband coverage, so that approximately 90 percent of U.S. households are now able to obtain a broadband connection from a provider other than their incumbent local telephone company, principally cable modem service. *See* Castleton Decl. ¶ 6. Indeed, in the top 50 MSAs where Verizon provides local telephone service as an incumbent, cable modem service is available to roughly 92 percent of the population. *See id.* Moreover, independent analysts estimate that 5.4 million residential broadband subscribers were added between the end of June 2003 and the end of March 2004, and that approximately 1.7 million residential broadband subscribers were added in the second quarter of 2004.<sup>168</sup> Wireless and other providers also are providing broadband services that are comparable to cable and DSL. *See* Castleton Decl. ¶ 13. In short, the Commission’s decision to eliminate line sharing has had precisely the procompetitive effects that the Commission

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<sup>167</sup> *See, e.g.,* G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update* at 2 (Nov. 3, 2003) (cable operators “are increasingly moving ‘off the rate card’, with market-specific pricing and increased use of promotional and bundled-price discounts specific to certain markets”).

<sup>168</sup> *See* R. Bilotti, *et al.*, Morgan Stanley, *Broadband Update: Bundling Is an Arms Race, Not a Price War* at 11, Exh. 7 (July 8, 2004).

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anticipated. Investment and deployment have increased, prices have fallen, new service offerings have been introduced, and output has increased as customers have subscribed to broadband services in ever greater numbers.

Under these circumstances, there is no possible basis for the Commission to conclude that competitors are “impaired” without line sharing. The Commission cannot reasonably conclude that competitors are impaired when alternative facilities are “significantly deployed on a competitive basis.” *USTA I*, 290 F.3d at 422. According to a Commission report issued just this June, more than 63 percent of residential and small business customers receiving 200 kbps service subscribe to cable modem, as opposed to just 34 percent that rely on DSL.<sup>169</sup> Of customers that receive more than 200 kbps in both directions, 85 percent use cable modem, while only 13 percent use DSL.<sup>170</sup> Simply put, local telephone companies are still secondary players in this competitive market and the Commission has no lawful basis for imposing a line-sharing obligation.<sup>171</sup>

Moreover, competitors have recently begun to rely on full loops to offer broadband, just as the Commission predicted they would. Covad has recently announced a new “dedicated-loop ADSL” offering that, according to Covad, “is ideal for customers who rely on other modes of voice communication such as Voice over Internet Protocol (VoIP) and cell phone service”

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<sup>169</sup> See Indus. Analysis & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Table 3 (June 2004).

<sup>170</sup> See *id.* at Table 4.

<sup>171</sup> In contrast, line sharing is not and has never been a significant competitive factor in the marketplace: it accounts for only a tiny fraction of the broadband market. See Castleton Decl. ¶ 14. Verizon estimates, based in part on the Commission’s own statistics, that line sharing accounts for less than 1 percent of mass-market broadband lines. See *id.*; see also Response of Verizon to Petitions for Reconsideration at 41-42, CC Docket Nos. 01-338, *et al.* (FCC filed Nov. 6, 2003).

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because it gives them “the option to integrate VoIP directly onto the broadband line, relieving them of the need for traditional analog telephone service from the local voice provider.”<sup>172</sup>

Indeed, more CLEC broadband customers are served through whole-loop offerings than through line sharing.<sup>173</sup> The advent of VoIP over the past year strengthens the Commission’s conclusion in the *Triennial Review Order* that sufficient revenue opportunities exist to require data CLECs to pay for the entire loop. *See* Castleton Decl. ¶¶ 14-15.

Carriers and ISPs also have the option of negotiating commercial agreements to obtain the connectivity and features they desire. For example, Verizon negotiated and developed a specialized wholesale arrangement that EarthLink had requested to provide broadband access to EarthLink customers. *See id.* ¶ 16. And Verizon did so even though no Commission rule required Verizon to provide that service. Verizon also recently announced an interim agreement with Covad to allow Covad to continue to obtain access to the high-frequency portion of the loop on negotiated terms, despite the planned phase-out of mandatory line sharing. *See id.* Such voluntary, market-based solutions demonstrate that mandatory line sharing is unnecessary even when intramodal competitors are concerned. *See id.*

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<sup>172</sup> Covad Press Release, *Covad Launches Dedicated-Loop ADSL for Consumers and Small Businesses Nationwide* (July 6, 2004), available at [http://www.covad.com/companyinfo/pressroom/pr\\_2004/070604\\_news.shtml](http://www.covad.com/companyinfo/pressroom/pr_2004/070604_news.shtml).

<sup>173</sup> *See, e.g.*, Ex Parte Letter from Susanne Guyer, Senior Vice President — Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, at 1-2, CC Docket Nos. 01-338, *et al.* (May 19, 2003) (documenting that, as of year-end 2002, in the Verizon-East region (*i.e.*, the former Bell Atlantic region), only 20 percent of CLEC DSL lines were provisioned using line sharing); *see also* Covad Press Release, *FCC Grandfathers Covad Line-Sharing Customers Indefinitely; Covad Continues Focus on Bundling and Small Business Based on FCC Ruling* (Aug. 22, 2003) (“Covad’s business customers using dedicated lines account for about 60 percent of the company’s revenues.”); Charles Hoffman, President/CEO, Covad, Q2 2004 Covad Communications Earnings Conference Call — Final, FD (Fair Disclosure) Wire, Transcript 072704an.718, at 3 (July 27, 2004) (“It’s important to remember that 68% of Covad’s current revenue comes from business customers.”).

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**3. *The Commission May Not Ignore Its Own Prior Conclusions That the Costs of Line Sharing Outweigh the Benefits***

In the *Triennial Review Order*, the Commission concluded that line sharing was unnecessary based in part on “the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms.” *Triennial Review Order* ¶ 263. The Commission found that, “the costs of [line sharing] outweigh the benefits” and that the *unavailability* of mandatory line sharing “will encourage the deployment of new technologies.” *Id.* As noted above, the competitive development of the market since the Commission announced the end of mandatory line sharing has vindicated the Commission’s judgment entirely on this point.

The Commission may not simply disregard its conclusions in the *Triennial Review Order*, much less may it do so in the face of evidence that its policies have been enormously successful, as is the case here. Indeed, an agency’s failure to come to grips with its own prior decisions constitutes “an inexcusable departure from the essential requirement of reasoned decision making.” *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (internal quotation marks omitted).

Because there is no basis for finding that competitors are impaired without access to mandatory line sharing, because the Commission’s treatment of this issue in the *Triennial Review Order* was correct and was upheld on appeal, and because the imposition of mandatory line sharing at UNE prices would subvert the 1996 Act’s purpose of encouraging facilities-based competition, the Commission neither can nor should re-introduce mandatory line sharing.

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**C. The Commission Should Not Require Incumbents To Allow Competitors To Collocate at Remote Terminals**

In a footnote to the *NPRM*, the Commission “invite[d] parties to refresh the record . . . regarding collocation at remote incumbent LEC premises.” *NPRM* ¶ 11 n.38. Verizon has already addressed this topic at length in other Commission proceedings.<sup>174</sup> To sum up, collocation of competitors’ equipment at remote terminals is not necessary for interconnection or access to UNEs, and competitors are not impaired without such collocation. To refresh the record on this point, Verizon can now state that it has offered remote terminal collocation to competitors in 13 states for at least four years, yet *not a single competitor has ever taken advantage of the offer*. See Declaration of Thomas E. Church ¶¶ 4-5 (Attachment N). Plainly, competition is flourishing without remote terminal collocation. Maintaining this requirement increases the cost of deploying additional broadband facilities by requiring ILECs to make accommodations (and establish back-office support) for demand that has never materialized. The Commission should recognize these facts and eliminate a collocation requirement that is so obviously superfluous.<sup>175</sup>

Even if access via the remote terminal were technically feasible — which it is not, in most cases<sup>176</sup> — it would result in gross inefficiencies that would raise costs both for competitors

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<sup>174</sup> See, e.g., Comments of Verizon at 23-31, CC Docket Nos. 98-147 & 96-98 (FCC filed Oct. 12, 2000).

<sup>175</sup> Competitors have ample opportunity to access copper subloops without collocating equipment in ILEC remote terminals. Access is typically provided at a Feeder Distribution Interface (“FDI”), sometimes called the Serving Area Interface, which is generally nearby, but not necessarily within, the remote terminal enclosure. Competitors are assured of access to the copper loops they need via the FDI, and they face the same cost burdens as incumbents when doing so.

<sup>176</sup> For example, insofar as collocation of competitors’ line cards is contemplated, the line card manufacturers themselves, at an FCC-sponsored public forum, called the concept of a so-

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and for Verizon’s own customers. Each individual line card in a remote terminal gives access to multiple circuits for both voice and data functions. If each carrier supplied its own cards, dedicated to its use, multiple voice and data circuits in each remote terminal would be unavailable for any other customer — but few competitive carriers would have use for all of those circuits in every remote terminal. The net result would be to allow fewer customers to be served.

In sum, remote terminal collocation is a costly policy for which there is no demand. It should be eliminated.

## VII. OTHER ISSUES

### A. The Commission Correctly Found That CLECs Are Not Impaired Without UNE Access to Signaling Networks and Call-Related Databases

In the *NPRM*, the Commission incorporated into this proceeding “the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order*, including discussion of issues such as . . . access to signaling.” *NPRM* ¶ 12. The only party to raise the issue of access to signaling was TSI, in a letter filed after the deadline for filing petitions for reconsideration. *See* TSI Oct. 3, 2003 Letter. Because the deadline for filing petitions for reconsideration is statutory, TSI’s letter cannot serve as a basis for reconsidering the decision that signaling does not need to be unbundled. *See* 47 U.S.C. § 405 (“A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.”). In any event, nothing in TSI’s letter

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called “universal backplane” that would accommodate multiple types of line cards as “laughable” or “ludicrous,” since it would require redesign of “the whole system management and integration.” *See* Transcript, *Public Forum: Competitive Access to Next-Generation Remote Terminals*, at 129 (Alcatel), 132 (Copper Mountain), 133 (Lucent) (May 10, 2000), available at <http://ftp.fcc.gov/realaudio/tr051000.pdf>.

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calls into question the Commission's determination in the *Triennial Review Order* that CLECs are not impaired without UNE access to signaling; on the contrary, TSI's comments support the Commission's determination.

Signaling networks are “physically separate from” the ILECs' circuit-switched networks that carry voice calls, but that function in parallel with those circuit-switched networks, by carrying “instructions for call routing” and providing “access [to] call-related databases,” which provide information for billing and services such as Caller ID. *Triennial Review Order* ¶¶ 542 & n.1666, 549, 551. In the *Triennial Review Order*, the Commission found that the record demonstrated the existence of “numerous competitive suppliers of signaling services” and “call-related databases,” “all of which are actively providing [such] services to competitive LECs on a commercial basis.” *Id.* ¶¶ 545, 552-553. Indeed, the Commission found that there are multiple, non-incumbent “national” signaling networks and call-related databases “that competitive LECs can utilize throughout the country,” as well as regional providers and evidence “of self-deployment . . . by competitive carriers.” *Id.* ¶¶ 545, 547, 552-553. The CLECs likewise conceded that “multiple alternative providers exist.” *Id.* ¶ 546. AT&T, for instance, stated that “there is no apparent need for CLECs to be able to access unbundled signaling when they do not use ILEC switching” because “[s]uch signaling is available from other suppliers on a regional (if not national) basis.” AT&T Comments at 240 n.231, CC Docket No. 01-338, *et al.* (FCC filed Apr. 5, 2002). And Verizon provided uncontradicted evidence that it could “not identify a single carrier that obtains [signaling] as a UNE.” Verizon Comments at 130, CC Docket No. 01-338, *et al.* (FCC filed Apr. 5, 2002). For all of these reasons, the Commission found that CLECs are not

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impaired without unbundled access to incumbents' signaling networks and call-related databases. See *Triennial Review Order* ¶¶ 544, 551.<sup>177</sup>

In *USTA II*, the D.C. Circuit rejected CLECs' challenges to the Commission's findings, holding that "CLECs evidently have adequate access" to signaling and call-related databases without UNEs. 359 F.3d at 587. The D.C. Circuit also rejected claims that these alternative providers of signaling and databases exist only because of past FCC decisions mandating UNE access to these facilities, finding that "the CLECs point to nothing in the record demonstrating that this is so." *Id.* On the contrary, because the nationwide alternative providers of signaling and access to call-related databases, such as Illuminet and TSI, are not CLECs, these alternative providers deployed their networks *without* unbundled access to the incumbents' networks and databases. See 47 U.S.C. § 251(c)(3) (limiting obligation to provide UNEs to "requesting telecommunications carrier[s]"). Indeed, a filing by TSI after the effective date of the *Triennial Review Order* confirms that TSI views the availability of signaling as a UNE as harmful to its business and to the development of further competition in this market. See TSI Oct. 3, 2003 Letter at 2-3. Indeed, TSI argued that the Commission should ensure that signaling is not available under *either* § 251 *or* § 271, to "discourage[] competitors from unnecessary, continued reliance on RBOC facilities" and to "foster competition by encouraging competitors to build their own facilities or to seek out competitive alternatives." *Id.* There is no reason or need for

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<sup>177</sup> Because "signaling networks are accessed via the switch," the Commission held that CLECs that obtain unbundled access to an incumbent's circuit switches also can obtain unbundled access to the incumbent's signaling network and to the "call-related databases that the signaling networks permit carriers to access." *Triennial Review Order* ¶¶ 433 n.1327, 544, 551. The Commission also held that all CLECs can obtain unbundled access to an incumbent's 911 and E911 databases. See *id.* ¶ 557. Incumbents also must still "provide for interconnection between their signaling networks and the signaling networks of alternative providers" pursuant to § 251(a) and (c)(2). *Id.* ¶ 548.

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the Commission to revisit its conclusion that CLECs are not impaired without UNE access to signaling or call-related databases.

**B. The Commission Should Not Impose Combinations Requirements for 271 Elements**

In the *Triennial Review Order*, the Commission held that BOCs are not required, “pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251.” *Id.* ¶ 656 n.1990. As the Commission explained, and the D.C. Circuit affirmed, “items 4-6 and 10 of section 271’s competitive checklist contain no mention of ‘combining’ and . . . do not refer back to the combination requirement set forth in section 251(c)(3).” *Id.*; see *USTA II*, 359 F.3d at 589-90. First, the court agreed with the Commission that those checklist items “do not incorporate any of the specific requirements of § 251(c)(3), including the nondiscrimination prohibition specific to that section.” *USTA II*, 359 F.3d at 589. Second, the court rejected the CLECs’ claim that the Supreme Court’s decisions in *Iowa Utilities Board* and *Verizon* “mandate[] the combination rules the FCC promulgated under [§ 251(c)(3)],” explaining that the Supreme Court had, instead, held only that “the nondiscrimination language in § 251(c)(3) [is] ambiguous and deferred to the agency’s reading of it.” *Id.* Therefore, those cases do not “establish that a different rule would be unreasonable.” *Id.* The D.C. Circuit, however, did not address the question whether the Commission’s ruling that BOCs have no obligation to combine 271 elements “satisf[ies] the § 202 nondiscrimination requirement,” because no CLEC raised such a claim. *Id.* at 590.

In addressing these issues here, the Commission should reaffirm that BOCs have no obligation to combine 271 elements with each other or with elements required to be provided under § 251, and should hold that such a rule is consistent with § 202. Section 202 prohibits

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only “*unjust or unreasonable* discrimination in . . . practices . . . for or in connection with *like communication service*.” 47 U.S.C. § 202(a) (emphases added). Therefore, to find a violation of § 202, the Commission must find (1) that “the services are ‘like’”; (2) if they are, that “there is a . . . difference between them”; and (3) “if there is, . . . that [the] difference is [un]reasonable.” *Competitive Telecomms. Ass’n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993). Any claim that a refusal to combine 271 elements violates § 202 would fail at the very first step, because this Commission has held — and the D.C. Circuit has affirmed — “that an integrated service package is not ‘like’ its component services purchased individually.” *Id.* Verizon and other BOCs provide their retail customers with “integrated service packages,” while competitors seeking access to 271 elements — whether alone or in combination with each other or with elements under § 251 — are purchasing the “component services” of that integrated package. Retail customers and competitors plainly perceive that retail services and 271 elements are “different in . . . material functional respect[s].” *Ad Hoc Telecomms. Users Comm. v. FCC*, 680 F.2d 790, 795-96 (D.C. Cir. 1982). As the Sixth Circuit explained in an analogous context, if competitors “want[] to be treated like retail customers, [they] can pay . . . wholesale rates according to a scheme based on retail rates and then resell such service[s].” *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 591-92 (6th Cir. 2002); *see also Trinko*, 124 S. Ct. at 880 (recognizing that network elements provided to competitors are unlike services provided to retail customers).

In any event, it would be neither unjust nor unreasonable for BOCs to refuse to provide combinations that include 271 elements, or to combine them on terms different from those applicable to retail customers. The Supreme Court upheld the Commission’s combination rules for *UNEs* as reasonable because they “remove practical barriers to competitive entry into local-exchange markets while avoiding serious interference with incumbent network operations.” 535

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U.S. at 535. But this consideration has no applicability to 271 elements. By definition, the Commission has not found that competitors are impaired without UNE access to such elements. Therefore, there are no “practical barriers to competitive entry” to be overcome and no need for a combinations rule to ensure nondiscriminatory service.

Nor would there be any inconsistency between the Supreme Court’s decisions affirming the Commission’s UNE combination rules and a decision that § 202 does not require BOCs to combine 271 elements. In the *Local Competition Order*, the Commission held that “Congress did not intend that the term ‘nondiscriminatory’ in the 1996 Act be synonymous with ‘unjust and unreasonable discrimination’ used in the 1934 Act, but rather, intended a *more stringent standard*” in § 251(c). *Id.* ¶ 217 (emphasis added).<sup>178</sup> Because, as the D.C. Circuit has recognized, the Supreme Court’s decisions do not “establish that a different rule would be unreasonable” under § 251(c)(3), *USTA II*, 359 F.3d at 589, they impose no limitation on the Commission’s interpretation of the *less* stringent standard in § 202. Indeed, as the D.C. Circuit has explained, the “generality of the[] terms” unjust and unreasonable “opens a rather large area for the free play of agency discretion, limited of course by the familiar ‘arbitrary’ and ‘capricious’ standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).” *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

Finally, mandating that BOCs combine or commingle 271 elements would be inconsistent with the Commission’s determination that, under § 201 and § 202, a BOC must offer

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<sup>178</sup> Although the Commission, there, was comparing the standards in § 251(c)(2) and § 202, the language in § 251(c)(2) that the Commission found dispositive also appears in § 251(c)(3). Compare 47 U.S.C. § 251(c)(2)(D) (“on rates, terms, and conditions that are just, reasonable, and nondiscriminatory”) and *id.* § 251(c)(3) (“on rates, terms, and conditions that are just, reasonable, and nondiscriminatory”) with *id.* § 202(a) (“unjust or unreasonable discrimination”).

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271 elements at *market* rates, terms, and conditions — such as where it has entered into “arms-length agreements” with its competitors — and not at rates, terms, and conditions established by *regulation*. *Triennial Review Order* ¶ 664; *see also UNE Remand Order* ¶ 473 (“the market price should prevail” for 271 elements, “as opposed to a regulated rate”). As it has explicitly done with rates for 271 elements, the Commission should leave it to BOCs and CLECs to determine, in the first instance, whether BOCs will combine 271 elements or commingle them with UNEs and, if so, on what rates, terms, and conditions. CLECs will seek such rights if they find them valuable, and BOCs will have every reason to respond with reasonable rates, terms, and conditions. Because 271 elements are those for which the Commission has concluded that competition is possible *without* unbundled access, CLECs will have the option of going elsewhere, or self-provisioning, if they are dissatisfied with the BOC’s offer. And the Commission would retain authority to hear any specific complaints that might arise about the rates, terms, or conditions on which BOCs are offering to provide 271 elements.

Just as the Commission found that it would be “counterproductive” to mandate that 271 elements be provided at forward-looking rates, *UNE Remand Order* ¶ 473, it should recognize that it would be equally counterproductive to mandate that BOCs combine 271 elements, whether with other such elements or elements provided under § 251. Such a combinations rule encourages CLECs to resell the BOCs’ networks rather than to provide service over competitively deployed facilities. And it would be directly contrary to the Supreme Court’s decision in *Verizon* — which upheld TELRIC on the theory that “competition as to ‘unshared’ elements may . . . only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements” — if CLECs can combine those shared “bottleneck” elements with other shared elements available under § 271. 535 U.S. at 510 & n.27.

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**CONCLUSION**

For the foregoing reasons, the Commission should resolve the issues in this proceeding in accordance with these Comments.

Respectfully submitted,



Scott H. Angstreich  
J.C. Rozendaal  
KELLOGG, HUBER, HANSEN,  
TODD & EVANS, P.L.L.C.  
Sumner Square  
1615 M Street, N.W.  
Suite 400  
Washington, DC 20036  
(202) 326-7900

Michael E. Glover  
Edward Shakin  
Karen Zacharia  
Sherry Ingram  
Julie Chen Clocker  
VERIZON  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3071

Samir Jain  
Wilmer Cutler Pickering Hale and Dorr LLP  
1801 Pennsylvania Avenue, N.W.  
Washington, DC 20006  
(202) 663-6083

James G. Pachulski  
TechNet Law Group, P.C.  
1100 New York Avenue, N.W.  
Suite 365  
Washington, DC 20005  
(202) 589-0120

*Counsel for Verizon*

October 4, 2004

**APPENDIX A**

**THE VERIZON TELEPHONE COMPANIES**

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. They are:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Southwest Incorporated d/b/a Verizon Southwest  
The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Hawaii Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Unbundled Access to Network Elements

Review of the Section 251 Unbundling  
Obligations of Incumbent Local Exchange  
Carriers

WC Docket No. 04-313

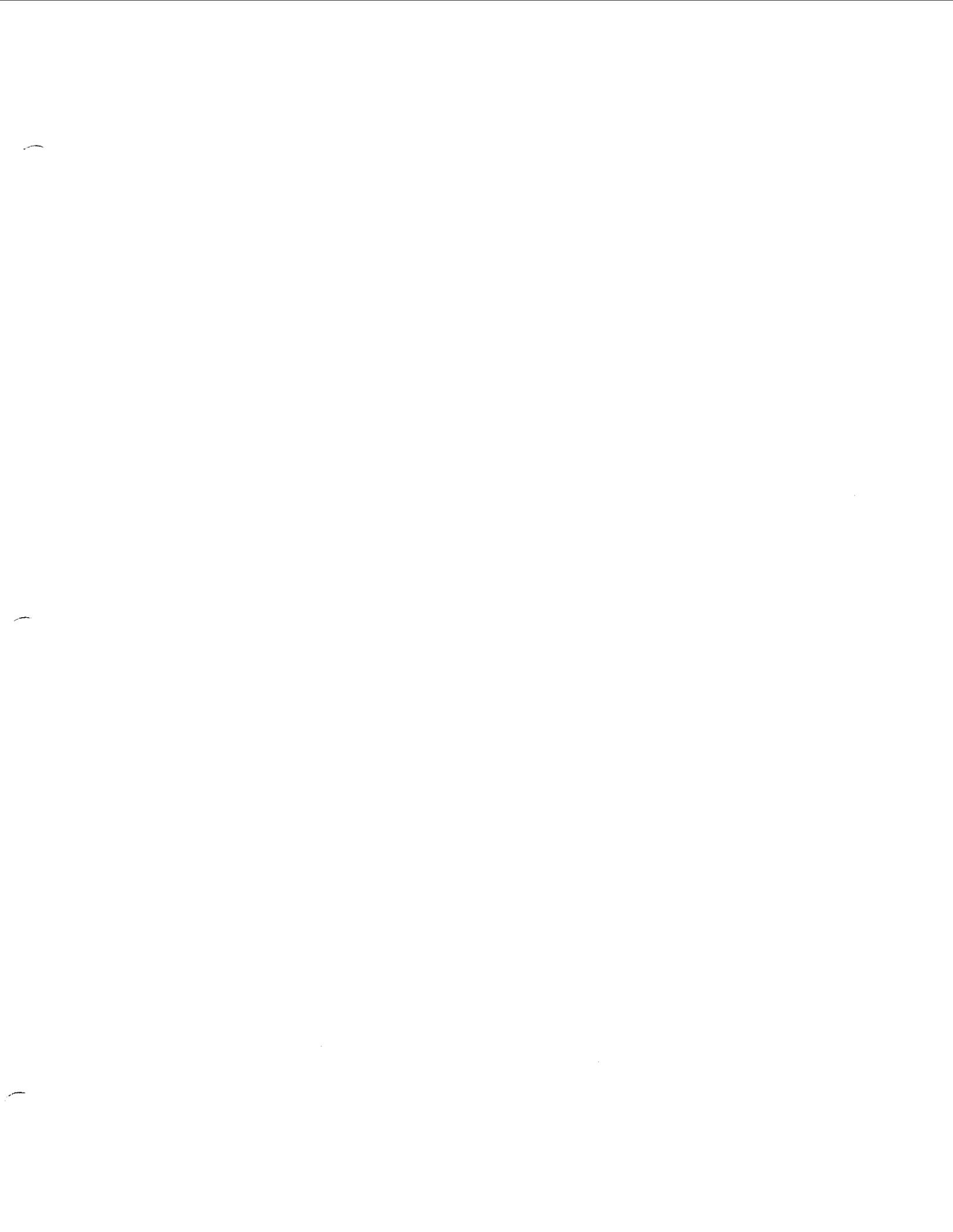
CC Docket No. 01-338

**ATTACHMENTS TO VERIZON COMMENTS**

**VOLUME 1**

**HIGH-CAPACITY FACILITIES AND SERVICES  
AND IMPAIRMENT ANALYSIS**

<b>Tab</b>	<b>Declarant</b>	<b>Subject</b>
A	Alfred E. Kahn and Timothy J. Tardiff	Impairment
B	Judy K. Verses, Ronald H. Lataille, Marion C. Jordan and Lynelle J. Reney	Competitive Data
C	Claire Beth Nogay	Special Access
D	Eric J. Bruno	Large Enterprise Customers
E	Claudia P. Cuddy	Out-of-Region Markets
F	Mohit Patel	Entrance Facilities
G	William E. Taylor	Special Access Pricing



**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

**DECLARATION OF ALFRED E. KAHN AND TIMOTHY J. TARDIFF  
SUBMITTED IN SUPPORT OF THE COMMENTS OF  
THE VERIZON TELEPHONE COMPANIES**

**STATEMENT OF QUALIFICATIONS**

1. My name is Alfred E. Kahn. My business address is 308 N. Cayuga Street, Ithaca, NY 14850. I am the Robert Julius Thorne Professor of Political Economy, Emeritus, Cornell University and Special Consultant with National Economic Research Associates, Inc. (NERA). I received my A.B. degree summa cum laude from New York University and my Ph.D. from Yale University, in 1942. I served as Associate Economist with the Antitrust Division of the U.S. Department of Justice in 1941-42; came to Cornell University as Assistant Professor in 1947 and have served successively as Chairman of the Department of Economics, Robert Julius Thorne Professor of Political Economy, member of the Cornell Board of Trustees and Dean of the College of Arts and Sciences. I have been Chairman of the New York State Public Service Commission and of the (U.S.) Civil Aeronautics Board; and in my capacity as Advisor to President Carter on Inflation, I participated actively in the

successful efforts of his Administration to deregulate both the trucking industry and the railroads. I am the author of the two-volume *The Economics of Regulation*, reprinted in 1988 by MIT Press, *Letting Go: Deregulating the Process of Deregulation*, published in 1998 by Michigan State University Institute of Public Utilities, *Whom the Gods Would Destroy or How Not to Deregulate*, published in 2001 by the AEI-Brookings Joint Center for Regulatory Studies, *Lessons from Deregulation: Telecommunications and Airlines after the Crunch*, published by the same AEI-Brookings Joint Center in January of this year, and have written and testified extensively in the area of direct economic regulation and particularly of the public utilities. In addition, I am the co-author of *Fair Competition, The Law and Economics of Antitrust Policy*, was a member of the Attorney General's National Committee to Study the Antitrust Laws and the National Commission on Antitrust Laws and Procedures in the Eisenhower and Carter Administrations, respectively; I have served as a consultant with both the Antitrust Division of the Department of Justice and the Federal Trade Commission; I was recently a member of the National Research Council – Transportation Research Board committee charged with reporting to Congress on the state of competition in the airline industry; and I have published numerous articles, particularly in recent years, on the requisites of efficient competition in regulated and previously regulated industries. I attach a copy of my full resume as Exhibit 1.

2. My name is Timothy J. Tardiff. My business address is 200 Clarendon Street, Boston, MA 02116. I am a Vice President at National Economic Research Associates, Inc. (NERA). I have specialized in telecommunications policy issues for over 20 years. I received a B.S. degree from the California Institute of Technology in mathematics (with honors) in 1971

and a Ph.D. in Social Science from the University of California, Irvine in 1974. My research has included studies of the demand for telephone services, such as local measured service and toll; analysis of the market potential for new telecommunications products and services; assessment of the growing competition for telecommunications services; and evaluation of regulatory frameworks consistent with the growing competitive trends. I have published articles in the regulatory economics literature, which in recent years have focused on policies for the increasingly competitive telecommunications industry. I attach a copy of my full resume as Exhibit 2.

### **INTRODUCTION AND SUMMARY**

3. The competitive landscape in telecommunications has changed dramatically in the eight years since the Telecommunications Act became law and the FCC issued the initial unbundling rules. The expectation and vision then was that competition for circuit-switched voice services could be jump-started by making unbundled network elements (UNEs) generously available at total-element long-run incremental cost (TELRIC) rates. Substantial fully facilities-based intramodal competition had already developed in concentrated metropolitan areas—taking advantage of regulatorily distorted rate structures—in the form of independent carriers, using modern fiber technology, to provide subscribers access to long-distance carriers and then the entire range of telecommunications services, mainly to large business customers and interexchange carriers. The prospect of intermodal competition, in contrast, was still uncertain. As Verizon demonstrates (and we summarize below), today's realities are considerably different. While competitive local exchange carriers (CLECs) offer voice services over numerous circuit switches in

combination with UNE loops, as contemplated by the Act, competitors using different technologies—such as wireless and packet-switched VoIP on broadband connections—have grown dramatically. As a result, the number of incumbent local exchange carrier (ILEC) subscriber lines has decreased markedly and, over the last 65 years, unprecedentedly. These extensive and growing competitive networks provide consumers with the full benefits of facilities-based, intermodal competition, benefits far more extensive than the benefits that UNE-based competition alone could provide.

4. The FCC's determination of how to restructure its unbundling rules today must take fully into account this new competitive environment, as well as of course conforming to the requirements of the D.C. Circuit's *USTA II* decision.<sup>1</sup> The consequence of that decision is that any new unbundling rules must require the ILECs to make UNEs available to competitors at TELRIC prices only if competitive entry would otherwise be uneconomic. And, consistently with the Court's previous directions in *USTA I*,<sup>2</sup> the determination of whether or not competition from rival companies would be impaired if competitors were denied use of the UNE (or UNEs) at issue must hinge at least in part on whether its supply exhibits characteristics of natural monopoly.<sup>3</sup>

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<sup>1</sup> *United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

<sup>2</sup> *United States Telecom Ass'n. v. FCC*, 299 F.3d 415, 422 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

<sup>3</sup> The D.C. Circuit said that "A cost disparity approach that links 'impairment' to universal characteristics, rather than ones linked (in some degree) to natural monopoly, can hardly be said to strike such a balance." Indeed, in the proceeding that produced the unbundling rules subsequently vacated by the *USTA I* decision, one of us (Kahn) recommended:

The test that the Commission should apply is a simple one: the element in question must be one without which it is not economically feasible to offer the end-product or service in question *and* that [it] is economically infeasible for the would-be competitor to obtain from any source other than the ILEC, whether by purchase or by constructing its own facility. The ILEC, in other words, must enjoy a monopoly in its supply, in the simple and original meaning of that term.

5. In making such impairment determinations, economic principles as well as the D.C. Circuit's directives require that the unbundling rule take into account (1) the availability of other means of obtaining the input in question or its equivalent, including in certain situations other tariffed services of the ILEC, such as special access and (2) whether ILECs face intermodal competition from facilities-based carriers deploying different technologies and/or network configurations (e.g., cable modems, which are strong competitors of the ILECs' DSL for high-capacity Internet access and which enable new competitive voice services in the form of voice over internet protocol (VoIP)). These considerations quite properly focus on whether there is or could feasibly be competition for the ILECs' local exchange and exchange access services, by one means or another, rather than on whether a particular kind of provider, requiring inputs similar or identical to the UNE in question, can compete without access to that UNE. For example, as both the D.C. Circuit and this Commission recognize, not only is there genuine competition for high-capacity Internet access, but more subscribers in fact have cable modems than DSL. Moreover, cable companies—whose lines pass by more than 95 percent of all households<sup>4</sup>—have, in increasing numbers, been offering competing packages of plain old circuit-switched telephone service without the need for either cable modems or DSL; and when they enter, achieve market shares in the 20 to 30 percent range.<sup>5</sup> In addition, there is already effective

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<sup>4</sup> The Television Bureau of Advertising reports that over 98 percent of all U.S. households have televisions. "TV Basics: Television Households," [http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02\\_TVHouseholds.asp](http://www.tvb.org/rcentral/mediatrendstrack/tvbasics/02_TVHouseholds.asp) (accessed September 20, 2004). The Cable Center reports that cable television is available to 97 percent of these television households. "Cable History: Timeline," <http://www.cablecenter.org/history/timeline/index.cfm> (accessed September 29, 2004). Therefore, cable television facilities pass at least 95 percent of households (0.983 x 0.97).

<sup>5</sup> For example, Cox reported that it served 1 million of the 5 million households it passed by the end of 2003. Cox Communications, Inc. 2003 Summary Annual Report at p. 4. A year earlier, it reported that it served more than 30 percent of households in its oldest market—Orange County California—and Omaha, an achievement

competition for voice telecommunications, both local and long-distance, when customers can use either cable modems or DSL connections to access VoIP: VoIP services now compete vigorously against the calling packages offered by both ILECs and traditional long-distance carriers.

6. The increase in intermodal competition, even since the record in the TRO proceeding closed, makes our admonition at that time about the competition-inhibiting effects of asymmetrical sharing obligations even more pertinent today:

That competition is, almost by definition, “intermodal”; and it is unquestionably impeded by mandatory sharing requirements imposed on incumbents operating in one single “mode”—especially at rates equated to the putatively perfectly competitive levels. The absurdity of imposing such obligations on incumbent telephone companies in the offer of broadband services, and not on cable or wireless, which have at least the double the market share of the former, is no greater than ignoring the similar convergence—again involving wireless and cable telephony—in the provision of local exchange services. Under circumstances in which these last volumes are no longer growing, policies that measure their success by the number of competitors that are encouraged to get a piece of this action may be not only no longer necessary, but harmful and likely to be ultimately futile.<sup>6</sup>

**THE COMMISSION’S IMPAIRMENT DETERMINATIONS MUST REFLECT THE SUPERIORITY AND GROWTH OF FACILITIES-BASED COMPETITION.**

7. The Telecommunications Act’s objective “to promote competition and reduce regulation” is completely consistent with our long-standing endorsement of the proposition that competition is superior to regulation whenever it is feasible.<sup>7</sup> And in the case of

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that took approximately four years. FindProfit.com, “Profitmap: Cable Companies Grab Share in Telephony Market,” February 21, 2003, <http://www.findprofit.com/archive/1996.html> (accessed September 29, 2004). The Cable Center, *op.cit.*, reports that cable telephony began in 1998.

<sup>6</sup> Reply Declaration of Alfred E. Kahn and Timothy J. Tardiff in CC Docket No. 01-338 (July 16, 2002).

<sup>7</sup> “[t]he central argument of these two volumes, that society’s choices are always between or among imperfect systems, but that whenever it seems likely to be effective, even very imperfect competition is preferable to regulation.” Alfred E. Kahn, *Economics of Regulation*, Cambridge: MIT Press, 1988, p. xxiii.

telecommunications, a capital-intensive industry subject to unusually rapid technological innovation, *facilities-based* competition—not only in price but also, more importantly, in the offer of new services and service features—is the most beneficial to consumers.<sup>8</sup> Indeed, when CLECs merely resell under their own brands services actually provided by ILEC networks, as they have increasingly done as UNE platforms (UNE-P) have become available at very low prices, the benefits from innovation are minimal to non-existent. As one of us recently observed:

Switches are at the heart of both product- and process-innovation in telecommunications.... [S]ervices using the switches of the incumbents, as well as their access lines, effectively constituted no competition since all they did was cannibalize sales at retail of services actually provided by the incumbents. As Chairman Powell and Commissioner Abernathy put it in their vehement dissent from the Commission's long-delayed triennial review decision

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The FCC itself has long recognized the superiority of competition over regulation as a mechanism for producing prices with the characteristics that its TELRIC rules were supposed to mimic. For example, in its 1997 access charge reform order, in opting for a market-based over a prescriptive mechanism for establishing prices, it said:

Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest. In addition, using a market-based approach should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets. *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982 ¶ 263 (1997).

<sup>8</sup> The superiority of facilities-based over the UNE and resale competition provided by the Telecommunications Act was clearly articulated by the D.C. Circuit in its directives to the FCC in the *USTA I* decision and subsequently acknowledged to some extent by the FCC in its TRO order. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 3 (2003). The Court actually deprecated as “synthetic” competition that entails widespread use of shared facilities:

If competition performed with ubiquitously provided ILEC facilities counts, the more unbundling there is, the more competition.... But the Commission never makes the argument in quite so stark a form, unwilling to embrace the idea that such completely synthetic competition would fulfill Congress's purposes. 290 F.3d at 424.

The Court here recognized what had become increasingly clear: that if the ILECs are required to make UNE-Ps available to CLECs at commission-stipulated prices, the regulators are actually fixing the wholesale prices of the bundle of telephone services, confining competition to the retail level—in which event, the *only* substantial competition available would be intermodal.

announced on February 20, 2003, the UNE-P produces the semblance of competition but not the substance....

Second, and most fundamentally, the recovery of this devastated industry and the establishment of a genuinely competitive market depends upon facilities-based competition embodying technological innovation, rather than the hothouse competition induced by regulatory subsidization.<sup>9</sup>

8. The presence of UNE-P is the result of the FCC's subsequently vacated orders that required ILECs to unbundle circuit switches everywhere. Not only is the mandatory availability of the "brains"<sup>10</sup> of a competitor's facilities at attractive TELRIC prices presented by the UNE-P inimical to innovation by ILECs and CLECs alike, it is clearly not necessary for competition. As Verizon describes in detail, competing carriers, using varying technologies, are entering and attracting customers with new services. Among the most important examples:<sup>11</sup>

- Cable television companies, which are the leading providers of high-speed access to the Internet, are able to offer nearly ubiquitous connections for voice

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<sup>9</sup> Alfred E. Kahn, *Lessons from Deregulation: Telecommunications and Airlines after the Crunch*: Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, 2004, p. 33. As Chairman Powell stated in his dissent:

Consistently underlying my preferences in this area is a commitment to promote and advance... facilities-based competition that is meaningful and sustainable, and that will eventually achieve Congress' stated goal of reducing regulation. The benefits of such a policy are straightforward: Facilities-based competition means a competitor can offer real differentiated service to consumers—*the switch is the brains of one's network and to be without one is to be a competitor on life support fed by a hostile host.*

Separate Statement of Chairman Michael K. Powell, Dissenting in Part, attached to FCC press release, "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers," February 20, 2003 (stress supplied).

<sup>10</sup> The characterization is Chairman Powell's. See note 9, above.

<sup>11</sup> We recognize that our reliance here on the documentation by Verizon adds no weight to it: we do so to the extent, however, that it accords with our own general observation and reflects our own independent convictions about the importance of technological and commercial innovation as a most important generator of competition and benefit to ultimate consumers. We recognize, also, that these qualitative citations can equally be interpreted as demonstrating that the glass is only partially full—and therefore partially empty. In our independent judgment, however, the facts adduced by Verizon deserve the greater emphasis because of the importance of *potential* as well as actual competition and of inter-modal, technology-expanding over intra-modal competition.